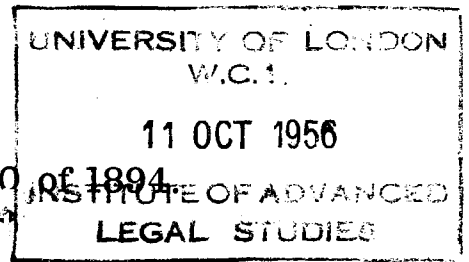


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In the Privy Council.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN THE MUNICIPAL CORPORATION OF THE CITY OF
 TORONTO *Appellants*

AND

WILLIAM VIRGO. *Respondent.*

CASE FOR THE APPELLANTS.

This is an appeal, by special leave of Her Majesty in Council, from a judgment of the Supreme Court of Canada, which quashed a section of By-law 2934 in amendment of By-law 2453 of the City of Toronto. The judgment of the Supreme Court was in reversal of that of the Court of Appeal for Ontario, composed of four Judges—Haggarty, C.J., Burton, Osler, and MacLennan, J.J.A.—who unanimously affirmed the judgment of Chief Justice Galt, who had dismissed an application to quash the By-law. In the Supreme Court, the Court hearing the present Respondent's appeal was composed of Fournier, Taschereau, Gwynne, Sedgewick, and King, J.J., and of these Fournier and Taschereau, J.J., were for dismissing the appeal and affirming the By-law, while Gwynne, Sedgewick, and King, J.J., pronounced in favour of quashing it. In the result, therefore, it will be seen that five Judges of the Ontario Courts and two Judges in the Supreme Court, seven in all, were in favour of the section, while three Judges pronounced for quashing it, and their judgment has prevailed.

Record,
 p. 49.
 p. 16.
 p. 11.

2. The section in question is designated as sub-section 2a of Section 12 of By-law 2934 in amendment of Section 12 of By-law 2453, by which the original By-law as amended is made to read as follows:—

pp. 9, 10.

“ By-law No. 2453.

20 “ A By-law respecting the appointment of a General Inspector of Licenses and the issue of licenses in certain cases.

“ Passed 13th January 1890.

“ The Municipal Council of the Corporation of the City of Toronto enacts as follows:—

12. There shall be taken out by

“ (1)

“ (2) All hawkers, petty chapmen, or other persons carrying on petty trades, or who go from place to place, or to other men's houses, on foot or with any animal bearing or drawing any goods, wares, or

“ merchandise for sale, or in or with any boat, vessel or other craft, or
 “ otherwise carry goods, wares, or merchandise for sale; except that no
 “ such license shall be required for hawking, peddling or selling from any
 “ vehicle or other conveyance, goods, wares or merchandise to any retail
 “ dealer, or for hawking or peddling goods, wares or merchandise the
 “ growth, produce or manufacture of this Province, not being liquors
 “ within the meaning of the law relating to taverns or tavern licenses, if
 “ the same are being hawked or peddled by the manufacturer or producer
 “ of such goods, wares or merchandise, or by his bona fide servants or
 “ employees, having written authority in that behalf, and such servant or 10
 “ employee shall produce and exhibit his written authority when required
 “ so to do by any municipal or peace officer : nor from any pedlar of fish,
 “ farm and garden produce, fruit and coal oil, or other small articles that
 “ can be carried in the hand or in a small basket, nor from any tinker,
 “ cooper, glazier, harness-mender, or any person usually trading or
 “ mending kettles, tubs, household goods or umbrellas, or going about and
 “ carrying with him proper materials for such mending.”

“ (2a) No person named and specified in sub-section 2 of this section
 “ (whether a licensee or not) shall, after the first day of July, 1892,
 “ prosecute his calling or trade in any of the following streets and portions 20
 “ of streets in the City of Toronto.

“ (1) Yonge Street, from the Bay to the Canadian Pacific Railway
 “ tracks ; (2) Queen Street from Pape Avenue in St. Matthew’s Ward to
 “ Jamieson Avenue in St. Alban’s Ward ; (3) King Street, from the River
 “ Don to Niagara Street ; (4) Spadina Avenue, from King Street to
 “ College Street ; (5) College Street, from Spadina Avenue to Bathurst
 “ Street ; (6) Parliament Street, from Queen Street to Winchester Street ;
 “ (7) Dundas Street, from Queen Street to St. Claren’s Avenue ; (8)
 “ Wellington Street, from Church Street to York Street.

Ontario
 Municipal Act,
 Sect. 495.

3. Some of the clauses of the Ontario Municipal Act under which the 30
 Appellants submit that it has power to pass the By-law in question are as
 follow :—

“ 495. The Council of any county, city and town separated from the
 “ county for municipal purposes may pass by-laws for the following
 “ purposes :—

“ (3) For licensing, regulating and governing hawkers or petty
 “ chapmen and other persons carrying on petty trades, or who go from
 “ place to place or to other men’s houses on foot or with any animal bearing
 “ or drawing any goods, wares or merchandise for sale or in or with any
 “ boat, vessel or other craft or otherwise carrying goods, wares or 40
 “ merchandise for sale, and for fixing the sum to be paid for a license for
 “ exercising such calling within the county, city or town and the time the
 “ license shall be in force. . . .

“ Provided always that no such license shall be required for hawking,
 “ peddling or selling from any vehicle or other conveyance any goods,
 “ wares or merchandise to any retail dealer, or for hawking or peddling
 “ any goods, wares or merchandise, the growth, produce or manufacture of
 “ this Province, not being liquors within the meaning of the law relating
 “ to taverns or tavern licenses, if the same are being hawked or peddled by

“ the manufacturer or producer of such goods, wares or merchandise, or
 “ by his bona fide servants or employees having written authority in that
 “ behalf, and such servant or employee shall produce and exhibit his
 “ written authority when required so to do by any municipal or peace
 “ officer.

Section 503. “ The Council of every city, town and incorporated
 “ village may pass by-laws—

10 “ (3) For preventing or regulating the sale by retail in the public
 “ streets or vacant lots adjacent thereto, of any meat, vegetable, grain,
 “ hay, fruit, beverages, smallware and other articles offered for sale :

“ (4) for preventing criers and vendors of small ware from
 “ practising their calling in the market place, public streets and vacant
 “ lots adjacent thereto.”

4. The Appellants submit that the words show an intention to commit to
 municipalities full and unrestricted control and government of the class of
 traders affected by this By-law. The municipalities are empowered to “ regulate,”
 “ govern,” “ prevent,” and the Council of the Municipality elected by the
 vote of the people must be taken to know the wants and requirements of the
 Corporation with respect to the legislation in question. The City Council
 20 in its discretion has passed this enactment in good faith and in the belief that
 the good government of the City required that the persons mentioned should
 not be allowed to ply their trade, which is generally noisy, incommoding and
 annoying, within the comparatively small area of ten miles out of a total of
 over two hundred miles of street length in the City of Toronto. All the
 reasons are not shown, nor is it necessary to show all the reasons which
 induced the Council of the Corporation to pass the By-law in question. In all
 probability, however, it was because the streets named in the By-law being
 crowded thoroughfares, the congregation of small traders with carts and vehicles
 upon them interfered with, and obstructed traffic, and the noise of their shrill
 30 cries and calling had become a nuisance.

5. Prohibition is necessary. It was suggested in the Court below that
 the Municipality should be confined to restricting only such cases as were
 proved to be particular nuisances in the way of obstruction of traffic or loud
 calling, but the Appellants submit that it is practically impossible to so
 legislate in this form as to accomplish the end intended, because each such case
 would require the intervention of a police or municipal officer, and the
 information and trial before a magistrate, thereby causing immense labour and
 expenditure of time, and the calling in of the voluminous and conflicting
 evidence usual in such cases as to whether or not a nuisance had been
 40 committed. It is submitted that the only way of dealing with such a question
 is that which has been adopted.

6. It is not the policy of the Courts to interfere with the discretion of
 the Municipal Councils when exercised in good faith ; the reason of this being
 that it is inexpedient that the discretion and opinions of the Judges should
 be substituted for that of the representatives elected to the Municipal Council,
 who are supposed to know and understand the wants of the people. This was
 the opinion expressed by Fournier, J., in the Court appealed from. If this were
 not the rule, individual ratepayers dissatisfied with enactments and regulations,
 passed in the interest of the people as a whole, would be continually resorting

to the Courts in the hope that the opinion of the Judges as to the propriety of the enactment would differ from that of the legislators who made it.

7. The Respondents contend that the amending By-law is made to apply to persons who are not required by the Municipal Act to take out a license, and therefore is bad. But this objection is not entitled to prevail, when it is noted that the seeming favour given to manufacturers and producers of goods, which are hawked and peddled by themselves, is limited to the proviso that they are not to be required to submit to the power and discretion of the Council or licensing officer, or to pay a fee. The reason for this favour doubtless is that the manufacturer and producer is already paying taxes for the land or machinery from or by which the goods are produced or manufactured, but the fact that such a trader is exempted from requiring a license and paying a license fee cannot establish that his conduct while engaged in his calling, or the places within which he shall pursue it, should not become the subject for municipal control and governance, if the necessity for such arises in the general interest. At any rate, this class comprises only a small fraction of those touched by the sub-section, and does not warrant the quashing of the whole sub-section. 10

8. The prohibition of this class of traders from crowded streets and those already supplied with shops tends to benefit the traders themselves, and also the residents of the remaining streets on which there are no shops, for the reason that, if the shopkeepers and pedlars are doing business in the same place, the latter will not sell as much as if they had their field of operation solely to themselves, and the residents on the crowded business streets already supplied by shops do not feel the necessity or convenience of buying from the pedlar, while those on residential and less crowded streets to whom the bringing of articles of produce may be a convenience will be the better served. 20

9. The history of the Ontario Municipal Act, which may be called a code of municipal law, shows that it has been built up from year to year by enactments passed to suit the growing wants and needs of the municipalities in a young and expanding country, and the fact that in some sections the Legislature has used language different from that of an enactment passed at a different time and under different circumstances, does not indicate that the Legislature here meant less than it said. The fact therefore that in some of the sections of the Municipal Act the words "prevent" and "prohibit" are used, does not show that the words "regulate" and "govern" as used in section 495 do not mean that the Council shall not have the power to partially prohibit if regulation requires such partial prohibition. 30

10. The power to regulate must include the power in some measure to prohibit, otherwise a regulation would generally be ineffectual. The power to regulate the liquor traffic in Ontario has been held to extend to prohibition on certain days and parts of days. 40

11. The enactment here is not such a restraint of trade as the Courts in the present conditions of society will say is unreasonable.

12. Although the By-law may not recite what particular wrongs or inconveniences are sought to be avoided or what good purposes are to be attained by passing the restriction in question, yet the omission should not displace the presumption that there were good and sufficient reasons for passing the By-law.

13. The Appellants therefore submit that the Municipal Council of the City of Toronto must be held to have knowledge of what is required by the municipality in the way of partial restriction, and although they have not expressed in the By-law their particular reasons, yet in the absence of any allegation of bad faith or impropriety in the material brought before the Court by the Appellants, it must be assumed that real grievances had existed which needed to be remedied or removed by the enactment in question.

14. Although there is not the slightest ground herein for supposing, nor is it in any way shown in the proceedings, that the Council intended by this
 10 enactment to discriminate against hawkers and pedlars in favour of permanent shopkeepers, yet, if such were the case, there would be good ground for so doing, because the trade carried on by persons keeping fixed establishments is, generally speaking, much more beneficial to the State than that of itinerant hawkers and pedlars. The character of the local trader is better known, and therefore there is greater security for the respectability of his dealings. He contributes also by the number of persons he employs and the taxes he pays much more than the itinerant trader to promote the wealth and increase the prosperity of the country, hence has arisen the expediency of framing laws
 20 which may operate as a restraint upon itinerant trades, may distribute their numbers, and, while they prevent any illegal practice, may oblige such persons to take out licenses and to submit to certain other regulations productive of revenue and profit.

15. The Appellants submit that the judgment of the Supreme Court of Canada is wrong, and should be reversed, for the following among other

REASONS.

1. Because the words of the several sections of the Statute are sufficient to show the intention of the Legislature to confer power to impose the restriction provided for in the By-law.

2. Because the discretion of the City Council, having been exercised
 30 reasonably and in good faith, should not be interfered with.

3. Because nothing short of the prohibition provided will be effectual for the reasonable purpose sought to be attained by the By-law.

4. For the reasons contained in the judgments of those Judges who maintain the section.

EDWARD BLAKE.
 H. M. MOWAT.

ON APPEAL FROM THE SUPREME
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BETWEEN
THE MUNICIPAL CORPORATION OF
THE CITY OF TORONTO *Appellants*
AND
WILLIAM VIRGO . . . *Respondent.*

CASE FOR THE APPELLANTS.

FRESHFIELDS & WILLIAMS,
SOLICITORS FOR THE APPELLANTS.